IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2959/12

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY **First Applicant**

and

SAMWU obo VICTOR TAFU **First Respondent**

COMMISSIONER ML MATLALA *N.O* **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Third Respondent**

Heard: **24 November 2016**

Delivered: **12 December 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant, Mogale City Local Municipality (Municipality) seeks an order reviewing and setting aside the arbitration award issued on 5 November 2015 by the second respondent, Commissioner M.L Matlala *N.O* (Commissioner). The first respondent, South African Municipal Workers' Union (SAMWU) opposed the application on the merits, but contended that the application can be disposed of *in limine*, on the basis that it is deemed to have been

withdrawn and/or lapsed in terms of the provisions of the Practice Manual of this Court. In the alternative, SAMWU contended that the application ought to be dismissed on account of lack of timeous prosecution; and further that the Municipality failed to seek condonation for the late filing of the record, the Rule 7A (8) Notice, and the replying affidavit.

Background:

[2] SAMWU acts on behalf of Mr Victor Tafu (Tafu), who was in the Municipality's employ until his dismissal on 4 August 2009. He was dismissed following upon a disciplinary enquiry into allegations of misconduct pertaining to corruption, bribery and gross dishonesty. SAMWU challenged Tafu's dismissal at the third respondent, the South African Local Government Bargaining Council (SALGBC), and when conciliation failed, the matter came before the Commissioner, who had found that the dismissal of Tafu was both substantively and procedurally unfair.

[3] The Commissioner's finding on substantive fairness was based on the conclusions that the Municipality had acted inconsistently in disciplining and dismissing Tafu, and further that the sanction of dismissal was 'too harsh'. The procedural unfairness finding was made on the grounds that the Municipality had contravened the provisions of the Collective Agreement specifically in relation to the time period within which the Municipality was required to institute disciplinary proceedings upon charges being preferred against Tafu. In the light of these findings, the Municipality was ordered to reinstate Tafu in its employ, and to further pay him retrospective pay equivalent to 36 months' salary.

[4] On 6 November 2012, the Municipality had launched this review application. SALGBC had filed the record of proceedings with the Court on 8 January 2012, and the Notice in terms of Rule 7A (8) (a) was filed on 20 October 2014. The answering affidavit was filed on or about 3 November 2014. A replying affidavit was then filed on or about 12 November 2013.

The preliminary points:

[5] SAMWU's contention was that the transcribed record of proceedings was made available to the Municipality's attorneys of record on 28 and 29 January 2013, and nothing was done until October 2013. There is a dispute in regard to the net effect of the judgment delivered by Lallie J on 16 February 2016. The Municipality's contention is that the judgment disposed of any issues surrounding the late filing of the record of proceedings, or whether the review application ought to be deemed to have been withdrawn.

[6] In the application that came before Lallie J, SAMWU had sought an order in terms of which the review application was to be deemed withdrawn as a consequence of lack of timeous prosecution of that application. Lallie J had found that since SAMWU had based its application on the provisions of Clause 11.2 of the Practice Manual, its application could not succeed, as those provisions did not apply retrospectively to the review application in question. The application was accordingly dismissed.

[7] My understanding of Lallie J's order is that the application to have the review application deemed as withdrawn on account of a lack of timeous prosecution was disposed of. It would therefore be irregular to revisit the issue in the face of that standing order. The other preliminary issue pertains to the late filing of the replying affidavit in the review application. An application for condonation in this regard was filed by the Municipality on 27 July 2016, some 30 months since the replying affidavit was filed.

[8] In seeking condonation, the Municipality contended that upon SAMWU having filed the answering affidavit on 3 November 2014, the replying affidavit was due on 10 November 2014. Its attorneys of record had timeously prepared the replying affidavit and had provided same to the Municipality's Executive Manager for commissioning on 6 November 2014. However, due to other urgent matters to be attended to, the commissioning of the affidavit only took place on 13 November 2014, and was filed on the same day.

[9] In regards to the late filing of the application for condonation, this according to the Municipality, was attributable to the fact that a Mr Skhosana from the firms of its attorneys of record, who was responsible for handling the matter, had

left the firm. It was contended that as a result of Mr Skhosana having left, SAMWU's objection to the late filing of the replying affidavit was not discovered until June 2016 when preparations were being made for the hearing of the review application.

[10] The principles applicable to applications for condonation are trite as well articulated in *Melane v Santam Insurance Co. Ltd*[1]. The Constitutional Court in *Brummer v Gorfil Brothers Investment (Pty) Ltd*[2] and *Grootboom v National Prosecuting Authority*[3] confirmed that in considering whether condonation should be granted, the test to apply is that of the interests of justice, which must be determined with reference to all relevant factors including those identified in *Melane*. Thus, since the relevant factors were to be considered were inter-related, even if it was found that the explanation for the delay did not constitute a reasonable explanation, it would not necessarily be regarded as an absolute bar to condonation. What was needed was an objective conspectus of all the facts, as the importance of the issue and strong prospects of success may compensate for a long delay[4].

[11] In this case, it was common cause that the delay in filing the replying affidavit was a mere three days, which can hardly be considered excessive. In the light of the merits of this review application which are to be discussed later in this judgement, the court is prepared to accept the explanation proffered for the delay in that regard. The matter nonetheless does not end at that point.

[1] *1962 (4) SA 531 (A) at 532B-E,* where it was held that;

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[2] *2000 (2) SA 837 (CC).*

[3] *2014 (2) SA 68 (CC)* at para 50 - 51

[4] *Khosa v Absa Bank Limited (JA55/2013) [2015] ZALCJHB 1 (15 January 2015)* at para 10

[12] It is trite that the duty is upon the applicant to file an application for condonation as soon as the need to do so arises, or where it is brought to its attention that such an application was necessary. It is further trite that condonation cannot be had for the mere asking, and a party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full and detailed account or explanation for the delay, more specifically the reason why such an application was not filed when the need to do so became apparent.

[13] In opposing the application for condonation, it was submitted on behalf of SAMWU that the Municipality was made aware as far back as 18 November 2014 that an application for condonation was required. The Municipality had only filed such an application in July 2016, and some six days prior to the set-down date. The Municipality does not deny having become aware of the need to file the application as far back as November 2014. It nonetheless proffered a flimsy explanation why it had taken it about 30 months to file the condonation application. The internal workings of the Municipality's attorneys of record cannot by any account be a reasonable explanation for the delay. The fact that Mr. Skhosana had not done a proper hand-over when he left the firm cannot be an acceptable excuse. Be that as it may, in the light of the merits of the review application and the insignificant delay in filing the replying affidavit itself, it would not be in the interests of justice to deny condonation in this case. The Municipality nonetheless must be burdened with the costs of the application for condonation, as it had compelled SAMWU to oppose it in circumstances where it was unnecessary, after being warned that such an application was necessary. A cost order is even more appropriate where the application for condonation was filed a mere six days before the hearing date, and SAMWU was afforded little time to file an opposition.

The review application:

[14] Tafu was employed with effect from 20 May 1986 as a Data Inspector (Meter Reader Inspector) in the Municipality's Meter Reading Unit. The charges that led to his dismissal were framed as follows;

‘***Charge 1: Corruption/Act of bribery***

1.1 You are guilty of corruption of an act of bribery in that on or about February and April 2008, you took an amount of R7 000.00 from Mr and Mrs Swanepoel (complainants) thereby promising to settle the municipality account and cancelling all the interest that have accrued to their account.

Charge 2. Gross Dishonesty.

2.1 You are guilty of gross dishonesty in that on or about February and April 2008 you took an amount of R7 000.00 from Mr and Mrs Swanepoel (complainants) thereby promising to settle the municipality account and cancelling all interest that have accrued to their account’

[15] At the arbitration proceedings, Tafu had challenged the substantive fairness of his dismissal on the grounds that he did not contravene a rule or standard. He had denied having received any money from the complainants. He had contended that his colleague, Mr William Mogomotsi, had received the amounts in question from the Swanepoels, and had spent it on his wife’s medical treatment. Tafu had further complained that the sanction of dismissal was inappropriate and harsh. In the alternative, his assertion was that Mogomotsi, who had received the money in question from the Swanepoels, and had subsequently repaid it, was not dismissed. Mogomotsi was instead allowed to take early retirement, and the Municipality did not therefore apply discipline consistently.

[16] Tafu further challenged the procedural fairness of his dismissal on the basis that the Municipality failed to adhere to the provisions of the Collective Agreement in disciplining and dismissing him. In this regard, he complained that in terms of clause 13.3 of the Agreement, an employee could only be suspended for a period of three months, and if the Municipality could not comply with the time frames, it ought to have sought an extension of those time periods. Tafu’s contention was that he was suspended for a period of over three months and the Municipality had not sought an extension. He further complained that in terms of clause 6.5.9 of the Agreement, the

Municipality was required to prefer charges against him within a period of 5 and 15 days, and had not done so. He had further contended that even though he was afforded an appeal, he was not granted the opportunity to state his case as no appeal hearing was held.

The evidence at arbitration proceedings:

[17] Six witnesses had testified on behalf of the Municipality at the arbitration proceedings. These were Ms. M. Tshoane, the Manager: Revenue, under whose department Meter Reading fell; Mr B.E Baloyi, the Municipality's Operations Accountant (Meter Reading and Billing), and supervisor of all Meter Reading inspectors; Mr J. Baloyi, who had investigated the incident; Mr L Phungo, the incident investigator and 'prosecutor'; Mr T Tebjani, the Municipality's Manager: Credit Control and Client Services; Mr N P Matodzi; and Mrs Swanepoel (the complainant). Tafu was the sole witness in his own case. The evidence led can be summarised as follows;

[18] Tafu or any of the Meter Reading Inspectors in terms of their job description, were not allowed to approach residents to make any arrangement with them for payment of services or settling of Municipality accounts. Arrangements to settle outstanding debts in respect of services could only be made with the credit control/accounts department of the Municipality. Tafu was well aware of his role, as well as policies and procedures pertaining to Anti-Fraud and Corruption.

[19] Upon receipt of an affidavit from the Swanepoels in which they had alleged that money was taken from them with a promise that their municipal account will be dealt with, the matter was investigated. It was discovered that the Swanepoels had indeed paid an amount of R7000.00 to Mogomotsi, with the understanding or undertaking that their municipality account would be settled. The Swanepoels were also interviewed during investigations, and they had informed the investigators that indeed they were behind with their municipality payments. Mogomotsi had approached them and introduced Tafu to them as someone who worked in the accounts unit of the Municipality, and they were

assured that their electricity would not be switched off upon payments of the R7000.00 amount, which they had then paid.

[20] Mrs Swanepoel's testimony at the arbitration proceedings was that he and her husband had an outstanding amount of R73 000.00 in rates and taxes owed to the Municipality. She confirmed that Mogomotsi had introduced Tafu to them as someone who worked in the accounts department in the Municipality, and who could assist them in freezing or waiving the interests on the amounts owed to the Municipality. Mogomotsi and Tafu had presented her with a document which purported to be an official document of the Municipality. She had completed and signed the form, which was also signed by Tafu. Her expectation was that upon making payments as requested by Mogomotsi and Tafu, her outstanding account with the Municipality would be settled.

[21] Payments by the Swanepoels were made in instalments of R5000.00 which was first paid to Mogomotsi who came alone to the Swanepoels' residence. The balance of R2000.00 was paid to Mogomotsi in the presence of Tafu when they came to the Swanepoels' residence for the second time. Mrs Swanepoel was to later discover that the amounts she had paid were never credited into her municipality account. She had then approached Mogomotsi and Tafu to pay her back, and it was only after she had approached the Municipality's Ms Tshoane that she was advised to submit her allegations in writing.

[22] Mrs Swanepoel had further testified that both Mogomotsi and Tafu came to her house to ask her not to open a case against them at the Municipality. She had testified that the two had harassed and intimidated her. She confirmed that they had paid back her money in instalments in December 2008 and January 2009. This however was after she had reported the matter to the Municipality.

[23] Tafu in his defence denied any wrong-doing. He had testified that as a data inspector, it was his duty to assist residents with problems in making payments on their outstanding accounts. He confirmed having went to the Swanepoels' residence on no less than ten occasions with Mogomotsi. The

reason for the visit was to enquire about their outstanding municipality account. They had then dropped off a form, which was to be completed for the purposes of making payment arrangements with the Municipality. He had also signed that document after it was completed by Mrs Swanepoel, and had informed her to call him when they had the money so that he could refer them to the credit control department to make arrangements for payments. He had denied having received any money from Mrs Swanepoel, and contended that when the first amount was paid, he was in the Eastern Cape, and that he only heard of the second payment in the internal disciplinary enquiry. He had denied having harassed or intimidated Mrs Swanepoel.

The award:

[24] In the award, the Commissioner having had regard to the Code of Good Practice as contained in Schedule 8 of the LRA concluded that Mrs Swanepoel 'was unable to prove that Tafu received any money', as it was only Mogomotsi that was given the money. The Commissioner however concluded that Tafu was an accomplice to corruption as a result of his conduct in accepting that he was in accounts at the Municipality and that he would assist Mrs Swanepoel with her account; assisting Mrs Swanepoel in completing and signing the form; giving back money to Mrs Swanepoel; and asking Mrs Swanepoel not to open a case against him and Mogomotsi. Tafu was found to have been aware of the Municipality's rules and policies, and had contravened the rules that required of him to act in good faith and in the interests of the employer in 'handling the Swanepoel issue';

[25] In regard to consistent application of standards and rules, the Commissioner found that since both Mogomotsi and Tafu were involved in the same misconduct, it was inconsistent for the Municipality to dismiss Tafu and yet allow Mogomotsi to take early retirement, which was approved in August 2009, and long after Tafu was dismissed. The Municipality therefore was inconsistent in its application of discipline, particularly in regard to sanction.

[26] In regard to procedural fairness of the dismissal, the Commissioner concluded that since Tafu's suspension exceeded three months contrary to the

provisions of clause 13.3 of the Collective Agreement, he should have challenged it by referring an unfair labour practice dispute.

[27] In regard to the provisions of clause 6.5.7 of the Collective Agreement which required the Municipality to institute disciplinary proceedings within 5 to 15 days from the date of the notice of misconduct, the Commissioner found that since the Municipality did not institute such processes within the time frames stipulated, and further since there was no agreement to extend the period, Tafu's dismissal was also procedurally unfair. The unfairness was also compounded by the fact that although he was allowed to appeal, he was not afforded an opportunity of an appeal hearing.

The grounds of review and evaluation:

[28] It is settled law that an arbitration award will be susceptible to a review under the provisions of section 145 of the LRA if it does not fall within the range of decisions which a reasonable decision-maker could have made in the circumstances[5]. The Labour Appeal Court in *Head of the Department of Education v Mofokeng*[6] provided the following exposition of the review test:

> 'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.
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> The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (LAC)* at para 110.
[6] *[2015] 1 BLLR 50 (LAC*) at para 33.

> nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination'.

[29] In this case, central to the Commissioner's findings on the substantive fairness of Tafu's dismissal was whether the Municipality had consistently applied discipline in the light of Tafu being dismissed whilst his accomplice, Mogomotsi was allowed to take early retirement.

[30] The Municipality attacked the award on the basis that the Commissioner misconceived the nature of the enquiry in regard to the parity principles or failed to undertake the enquiry in a proper manner, or in the alternative, applied the principles in that regard rigidly. The principles surrounding inconsistency, or the so-called parity principle as were well articulated in *SACCAWU and Others v Irvin and Johnson (Pty) Ltd*[7] and other authorities can be summarised as follows;

[7] *(1999) 20 ILJ 2302 (LAC)* at para 29, where it was held that;

> 'In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the 'parity principle' … There is really no separate principle involved. Consistency must be measured by the same standards … Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy … Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. … If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not … necessarily mean that the other miscreants should escape. Fairness is a value judgment.'

a) The Courts have distinguished two forms of inconsistency, viz, historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; whilst the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct[8].

b) The concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice[9].

c) Employees must be measured against the same standards, i.e. like cases should be treated alike[10], and in determining sanction in respect of employees involved in the same misconduct, the employer must not be capricious, or act arbitrarily or be influenced by improper motives or discriminatory policies;[11]. Thus, a value judgment must always be exercised, and the principle should neither be applied rigidly[12], nor willy-nilly without any measure of caution[13].

d) When deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention[14].

e) A claim of inconsistency can never succeed where an employer is able to differentiate between employees who committed similar transgressions on the

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[8] *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2010) 31 ILJ 452 (LC)* at para [10]

[9] *ABSA Bank Limited v Naidu and Others [2015] 1 BLLR 1 (LAC)* at para [37]

[10] *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264A-D. See also *NUM and another v Amcoal Colliery t/a Arnot Colliery and Another [2000] 8 BLLR 869(LAC)*

> "The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence".

[11] See *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section) (JA2013/42) [2014] ZALAC 24 (15 May 2014)* at para 25 where the LAC held that:

> 'The idea of inconsistency in employee discipline derives from the notion that it is unfair that like are like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.'

[12] *SACCAWU and Others v Irvin and Johnson (Pty) Ltd* at 2313C-J where Conradie JA held that;

> "…Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case....

[13] *ABSA Bank Limited v Naidu* at para [36]

[14] *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others (2008) 29 ILJ 1180 (LC)* at para [36]

basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.

f) Thus, in appropriate cases an employer may be justified in differentiating between two employees guilty of the same transgression on the basis of their personal circumstances or on the merits of their respective cases[15].

g) while the parity principle is an important factor to take into account in the determination of the fairness of a dismissal, it is only a factor to take into account, and is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. The fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. The parity principle was never intended to promote or encourage anarchy in the workplace[16]

[31] Whether the Commissioner applied the principles related to inconsistency rigidly as submitted on behalf of the Municipality ought to be determined within the context of the overall evidence placed before him in relation to the charges preferred against Tafu.

[32] There can be no doubt that the allegations against Tafu were indeed serious, and the Commissioner glibly touched on this issue in the award. I did not understand the Commissioner's reasoning to be that the Municipality had not discharged its onus in regard to the charges. This understanding arises from the Commissioner's finding that the dismissal was 'too harsh', a conclusion that can only be made in circumstances where misconduct has been established. Equally so, a conclusion that the employer did not act consistently in dismissing an employee can only be in reference to a finding that indeed misconduct was committed.

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[15] *Southern Sun Hotel Interests (Pty) Ltd v CCMA &* others [2009] 11 BLLR 1128 (LC). See also *Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC),* and *SATAWU & Others v Ikhwezi Bus Service (Pty) Ltd (2009) 30 ILJ 205 (LC)* where it was held that an employer is indeed entitled to impose different penalties on different employees who had committed the same misconduct, provided there was a fair and objective basis for doing so.

[16] *Absa Bank Limited v Naidu and Others* at para 23

[33] The conclusion therefore that Mrs Swanepoel 'was unable to prove that Tafu received any money' is clearly a misconception of the enquiry and a misdirection. The onus was not upon Mrs Swanepoel to prove anything against Tafu. The Commissioner's duty in this regard was merely to look at the versions of Mrs Swanepoel and Tafu, and to make a determination as to which one was more probable, reliable or credible in line with the principles and approach proposed in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others*[17]. The Commissioner clearly failed in his duties in this regard.

[34] Tafu and Mogomotsi had clearly indulged themselves in corrupt and grossly dishonest activities by soliciting money from vulnerable members of the community which the Municipality served. They did so with a false promise that their outstanding municipality accounts would be settled. Tafu was charged with dishonesty amongst other things. Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently[18]. It was apparent from the evidence led on behalf of the Municipality that both Tafu and Mogomotsi were not authorised to make any arrangements with residents regarding payment of outstanding accounts.

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[17] *2003 (1) SA 11 (SCA)* para 14I–15E, where it was held that;

> 'To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail.'

[18] *Nedcor Bank Ltd v Frank and others (2002) 23 ILJ 1243 (LAC).*

They had nonetheless misrepresented themselves to the Swanepoels, or at least represented Tafu as a person from the Municipality's accounts division who could make any such arrangements.

[35] What is further apparent is that between Mogomotsi and Tafu, they took money from Swanepoel for their own personal benefit. Contrary to the Commissioner's conclusions, the probabilities favoured a finding that indeed Tafu had taken money from Swanepoel, together with Mogomotsi. Tafu had presented a mere denial, in the face of Swanepoel's evidence that money was handed to Mogomotsi and Tafu on two separate occasions. On the first occasion, Mogomotsi was on his own when he was handed over the money, but had on Swanepoel's version, contacted Tafu who was then in the Eastern Cape to inform him that the money was handed over. Tafu had confirmed that he was indeed in the Eastern Cape when Mogomotsi received the payment on the first occasion. On the second occasion, Swanepoel's version was that Tafu was present when money was handed over, whilst the latter presented a mere denial.

[36] Even if the money was not handed over personally to Tafu, there can be no doubt that he was part of this shameful episode throughout. It was established that he was party to the fleecing of money out of the Swanepoels as he had presented himself as a person from the Municipality's accounts division. He had also facilitated corrupt activities by attaching his signature to what appeared to an official document from the Municipality with the aim of getting money out of Swanepoel. Furthermore, even if he was not with Mogomotsi when he received the money from Swanepoels at all material times, he was present when the money was repaid, and was further present when the Swanepoels were harassed and intimidated into not pursuing charges or complaints against them. Had the Swanepoels not lodged a complaint, both Tafu and Mogomotsi would have got away with their dishonest conduct. The fact that they had returned the money to the Swanepoels is of no consequence.

[37] The Commissioner pointed out that Tafu did not act in the best interests of the Municipality 'in handling the Swanepoel' issue. The conduct in question was

not merely about the 'Swanepoel issue'. It was about the fact that the Municipality's employees had committed vile acts of misconduct in its name, which conduct was deserving of a summary dismissal.

[38] The Municipality is there to provide a service to members of the community, and to ensure that it gets revenue due to it in the form of rates and taxes. This is crucial for the Municipality to sustain its service delivery programmes. If the Municipality's own employees tasked with ensuring that revenue is secured through the proper collection of rates and taxes derail the Municipalities' programmes in that regard, especially by fleecing money out of unsuspecting and vulnerable residents, the Municipality would be failing in its duties if it does not deal harshly with such individuals. There is an obligation on the Municipality to protect its own integrity in its dealings with communities, and to protect communities from its own employees, who act nefariously in its name. The conduct in question clearly impacted on the reputation and integrity of the Municipality.

[39] It is in the light of the above that the Commissioner's conclusions in regard to the Municipality alleged inconsistent application of discipline is found to be extraordinarily baffling. An allegation of inconsistent application of discipline as already alluded to in the authorities referred to elsewhere in this judgment is not on its own a license to immunity. This is even moreso in circumstances where the misconduct in question is not only gross but also criminal in nature. It is apparent that the Commissioner was clearly blindsided by the allegation of inconsistency raised by Tafu, and had ignored all other relevant material before him, including the seriousness of the misconduct in question and its impact on the employment relationship. The fact that Mogomotsi was not disciplined at the time on account of his terminal illness as attested to by Matodzi, or that he had applied for medical boarding is but one of the considerations that the Commissioner could take into account in determining whether the Municipality had applied discipline consistently. Mogomotsi's own personal circumstances may have been persuaded the Municipality to act leniently against him. I agree with Ms. Ralehoko's submission that the excuse given at the time for not disciplining Mogomotsi is feeble in the extreme,

especially in the light of the allegations of misconduct against him. Even if there was no justification at the time to indemnify Mogomotsi, it was nonetheless not in dispute that he was ultimately charged on 31 August 2009, *albeit* his medical boarding had been approved as at 13 July 2009.

[40] Even if there might be merit in the allegation that the Municipality applied discipline inconsistently, it remained a fact that as a result of the misconduct in question, Tafu's continued employment by the Municipality posed a considerable operational risk to it, as he could no longer be trusted to carry out his duties and serve members of the public with honesty and integrity. His and Mogomotsi's conduct had caused harm to the Municipality and to the Swanepoels[19].

[41] What is even more significant in this case is that it does not appear anywhere in the record that Tafu felt or expressed any shame in what he and Mogomotsi had done. He instead sought to contrive an explanation which was inherently implausible in the light of the direct evidence of Mrs Swanepoel. For him and Mogomotsi not only to take money from the Swanepoels, who were trusting, and to thereafter harass and intimidate them into not pressing a case against them was shameless in the extreme. At no stage did it appear that Tafu had shown any contrition for his conduct.

[42] The Municipality's contentions therefore that the Commissioner rigidly applied the concept of inconsistency, and failed to take into account other factors or considerations in concluding that the dismissal was unfair have merit. A claim of inconsistency on its own is not sufficient to exculpate an employee involved in serious forms of misconduct, which was not only shameful but criminal in nature. The Commissioner's conclusions therefore that the dismissal was harsh are conclusions which a reasonable decision maker would not have

[19] See *Sidumo* at [78] where it was held that;

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list"

arrived at in the light of the material before him. The failure by the Commissioner to take into account all relevant factors in a determination of whether the dismissal was fair constituted an irregularity and a misdirection. This misdirection and irregularity in the determination of the dispute constituted a misconception of the nature of the enquiry, particularly since the Commissioner failed to address the central questions raised for determination. In the end, the award ought to be reviewed and set aside, as the distorting effect of the misdirection in question rendered the result of the award unreasonable.

[43] In regard to the issue of procedural fairness, I did not understand from Ms. Ralehoko's submissions to be that the Commissioner's findings in that regard were still being defended. Even if the decision of the Commissioner was to be defended, he had correctly pointed out that the suspension of Tafu over a period of three months contrary to the provisions of the Collective agreement was a matter that he ought to have referred to the SALGBC as an unfair labour practice, and had not done so. The finding nonetheless that the failure to institute disciplinary proceedings timeously constituted unfairness cannot be sustained, especially in the absence of prejudice being shown by Tafu.

[44] The mere failure to comply with timelines in the institution of disciplinary proceedings cannot on its own lead to unfairness. At worst, it may lead to an inconvenience. This however does not even appear to be the case in this matter as based on the evidence of Phungu, the initiator, Tafu was notified of the charges against him on 28 May 2009. The disciplinary enquiry was scheduled for 2 June 2009.The mere fact that proceedings were subsequently adjourned or postponed over time until their finalisation on 27 July 2009 cannot by all accounts lead to a conclusion that those proceedings were unfair.

[45] Equally so with the internal appeal, it was common cause that Tafu had lodged such an appeal. It appears that central to the Commissioner's award in this case was that Tafu had merely lodged an appeal and the Municipality therefore acted procedurally unfair in that it did not afford him an appeal hearing. The Commissioner nonetheless overlooked the fact that upon

lodging an appeal, Tafu had also referred a dispute to the SALGBC, and thus on the Municipality's version, waived his right to an appeal hearing. The finding on procedural unfairness is equally flawed and not reasonable. It therefore ought to be set aside.

[46] Voluminous records of the proceedings were placed before the Court, and given the protracted nature of this matter, no purpose would be served by remitting it back to the SALGBC. In the circumstances, it would be appropriate for the Court to substitute the findings of the Commissioner.

[47] I have had regard to considerations of law and fairness in regard to the issue of costs. Other than the costs related to the application for condonation for the late filing of the replying affidavit to the review application, I am of the view that no further order as to costs is warranted.

Order:

[48] Accordingly, the following order is made;

1. The late filing of the replying affidavit to the review application is condoned.

2. The applicant is ordered to pay to the First Respondent, the costs of the application for condonation for the late filing of the replying affidavit.

3. The arbitration award issued by the Second Respondent under case number GPD080923 dated 5 November 2012 is reviewed, set aside and substituted with an order that;

   > 'The dismissal of Mr V. V Tafu by Mogale City Local Municipality on 4 August 2009 was procedurally and substantively fair'

4. There is no order as to costs in respect of the review application.

E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the First and Second Applicants:	Adv. H.W Sibuyi
Instructed by*:*	Phungo INC
For the First Respondent:	Ms. T. Ralehoko of Cheadle Thompson & Haysom Attorneys